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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-188424

DATE: March 22, 1977

**MATTER OF: William A. Keel, Jr., and Richard Hernandez -
Small Business Administration - de facto employees**

DIGEST: Small Business Administration (SBA) asks whether it may retroactively adjust the effective appointment dates of two presidential transition employees who entered on duty a brief period in advance of their appointments. Alternatively, SBA desires to consider them as de facto employees. Generally, appointments may not be made retroactively effective. The two employees, however, may be considered de facto employees since they performed duties in good faith under color of authority. SBA may compensate employees for reasonable value of services performed while in a de facto status.

This matter involves a request dated February 11, 1977, from Mr. William I. Cooper, an authorized certifying officer of the Small Business Administration (SBA), for a ruling on the claims of Mr. William A. Keel, Jr., and Mr. Richard Hernandez, recently appointed employees of the SBA, for retroactive appointments and backpay.

Keel and Hernandez were members of President Carter's transition team and were assigned to duty with the SBA by the White House effective January 21 and 26, 1977, respectively. The White House did not instruct the SBA personnel office of the personnel actions it should take with respect to these two employees until February 3, 1977. On that date, pursuant to White House instructions, Keel was temporarily appointed, with the approval of the Civil Service Commission, as Executive Assistant to the Administrator for Transition Planning, in grade GS-301-18, step 1; and Hernandez was temporarily appointed under authority of Schedule C, 5 C.F.R. § 213.3332(p), as a Special Assistant to the Associate Administrator for Minority Small Business in grade GS-301-15, step 1.

The SBA desires to make these appointments retroactively effective to the dates Keel and Hernandez reported for duty at the agency. It contends that assignment of rates of compensation

B-188424

and physical preparation of personnel actions should be considered as merely administrative procedures necessary to complete the appointment action that was effective when Keel and Hernandez joined the agency. In the alternative, SBA urges us to consider Keel and Hernandez as de facto employees from the date they entered on duty until the date they were appointed in order that they might receive compensation for this period.

Our decisions have generally held that personnel actions, including appointments, cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation, or policy if not adjusted retroactively. See 54 Comp. Gen. 888 (1975) and decisions cited therein. After reviewing the factual situation here involved, we do not find that it satisfies any of the three criterion set forth above so as to be considered as an exception to our rule generally precluding retroactive appointments. Hence, there is no legal basis for allowing these appointments to be made retroactively effective to the dates Keel and Hernandez entered on duty with the SBA. 20 Comp. Gen. 267 (1940).

However, we must further consider whether Keel and Hernandez may be considered as de facto employees under our recent decisions, in order that they might be paid the reasonable value of their services for the period they were on duty prior to their official appointments. A de facto officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs the duties, his actions are those of a de facto officer or employee. 30 Comp. Gen. 228 (1950), 52 id. 700 (1973), and 55 id. 109 (1975).

Keel and Hernandez, as presidential transition team members, were ordered by competent authority to enter on duty at the SBA in advance of their official appointments. The Administrator and other high SBA officials were aware that Keel and Hernandez were performing work within the agency. These factors clearly demonstrate that the two transition team members performed the duties of the positions to which they were subsequently appointed with apparent

B-108424

right and under color of authority and claim of title to the position. Moreover, they served in good faith and with no indication of fraud. Thus, Keel and Hernandez may be considered to be de facto employees.

Persons who serve in good faith as de facto officers or employees may be paid compensation equal to the reasonable value of services rendered during such period of service. 52 Comp. Gen. 700, supra, 55 id. 109, supra.

Accordingly, we conclude that the SBA may compensate Keel and Hernandez for the reasonable value of the services they rendered while in a de facto status. In this instance, the reasonable value of service rendered may be established at the rate of basic compensation set for the positions to which they were appointed on February 3, 1977.

Deputy Comptroller General
of the United States